UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

Paper No. 18

COPY MAILED

NOV 3 0 1999

SPECIAL PROGRAMS OFFICE
DAC FOR PATENTS

SHALONG MAA
SMA INTERNATIONAL INC.
816 MCDEAVITT DR, 1077
ARLINGTON TX 76011

In re Application of :
Shalong Maa :
Application No. 08/833,342 : DECISION DISMISSING PETITION
Filed: April 4, 1997 :
Attorney Docket No. 3807.2US :

This is a decision on the petition filed October 27, 1999 under 37 CFR 1.183, requesting waiver of the rules to the extent they prohibit consideration of the merits of a petition under 37 CFR 1.181(f) that is filed more than two (2) months after the action that instigates the petition.

The petition is dismissed.

Petitioner assert that the delay in submission of the petition under 37 CFR 1.181 is that "APPLICANT did not finish evaluating all the details of the ACTION until after the said two-month period."

Suspension of the rules under 37 CFR 1.183 may be granted in an "extraordinary situation, when justice requires". The facts presented on the record do not establish an extraordinary situation. Petitioner has not established any special circumstances or equities that would require suspension of the rules in the interests of justice.

Petitioner has not provided an adequate showing that the delay in submission of the petition was caused by circumstances beyond his control. Equitable powers should not be invoked to excuse the performance of a condition by a party that has not acted with reasonable, due care and diligence. U.S. v. Lockheed Petroleum Services, 709 F.2d 1472, 1475 (Fed. Cir. 1983).

The Office, where it has the power to do so, should not relax the requirements of established practice in order to save an applicant from the consequence of his delay. See Ex parte Sassin, 1906 Dec. Comm'r Pat. 205, 206 (Comm'r Pat. 1906) and compare Ziegler v. Baxter v. Natta, 159 USPQ 378 379 (Comm'r Pat. 1968) and Williams v. The Five Platters, Inc., 510 F.2d 963, 184 USPQ 744 (CCPA 1975). There is no adequate showing of "an

extraordinary situation" in which "justice requires" suspension of 37 CFR 1.97(e). See, Nitto Chem. Indus. Co. v. Comer, 39 USPQ2d 1778, 1782 (D.D.C. 1994)(circumstances are not extraordinary, and do not require waiver of the rules, when a party makes an avoidable mistake in filing papers). Circumstances resulting from petitioner's, or petitioner's counsel's, failure to exercise due care, or lack of knowledge of, or failure to properly apply, the patent statutes or rules of practice are not, in any event, extraordinary circumstances where the interests of justice require the granting of relief. See, In re Tetrafluor, Inc., 17 USPQ2d 1160, 1162 (Comm'r Pats. 1990); In re Bird & Son, Inc. 195 USPQ 586, 588 (Comm'r Pats. 1977).

Moreover, the rules of practice already provide an adequate remedy for this situation, that would not require waiver of the rules. It is brought to petitioner's attention that the PTO will not normally consider an extraordinary remedy, when the rules already provide an avenue for obtaining the relief sought. See Cantello v. Rasmussen, 220 USPQ 664, 664 (Comm'r Pat. 1982). As correctly noted in the decison of the Director mailed November 22, 1999, there has been no repeated action by the examiner subsequent to his as of yet forthcoming review of applicant's request for reconsideration. That is, petitioner may yet have relief under the rules of practice if such becomes necessary after the examiner's next action.

Petitioner is advised, however, that review of an adverse rejection of one or more claims is by way of appeal, not by way of petition. That is, once one or more claims has been twice, or finally, rejected, then the review of the rejection lies by way of appeal under 35 USC 134 and 37 CFR 1.191 *et seq*, as more fully explained in the Manual of Patent Examining Procedure, Chapter 1200, and not by petition. See MPEP 1201.

This file is being returned to Technology Center 3713 for further examination.

Telephone inquiries relevant to this decision may be addressed to the undersigned at (703) 305-1820.

Brian Hearn

Brian Hearn
Special Projects Examiner
Office of Petitions
Office of the Deputy Assistant Commissioner
for Patent Policy and Projects